Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1022, 87-1112

In The Supreme Court of the United States

October Term, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLAIRE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

-and-

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

BRIEF SUBMITTED BY JOHN J. MARCHI OF THE CITY OF NEW YORK AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

Table of Authorities ii

Cases ii
Constitutional and Charter Provisions ii
Other Authorities iii

Summary of Argument 2

Statement of the Interest of the Amicus Curiae 3

Argument 4

POINT ONE—The Courts Below Erred In Not Considering The Citywide Officials In Its Analysis Of The Board Of Estimate 4

POINT TWO—The Courts Below Erred In Viewing The Board As An Institution Standing Alone, Rather Than As Part Of The Entire Structure Which Governs Over All The People Of The City Of New York, Whose Ranks Are Much Larger Than Merely Census Population 10

POINT THREE—If The Lower Courts' Determinations Are Upheld, Staten Island Will Be Left Without Meaningful Representation In City Governance, With The Performance Of An Implied Condition Of Consolidation Rendered Impossible 16

Conclusion 20

TABLE OF AUTHORITIES

Cases *Page*

Abate v. Mundt, 403 U.S. 182 (1971) 5

Avery v. Midland County, et al., 390 U.S. 474 (1968) 11,13

Baker v. Carr, 369 U.S. 186 (1962) 17

Burns v. Richardson, 384 U.S. 73 (1966) 15

Cohen v. Maloney, 410 F.Supp. 1147 (D.Del. 1976) 4

Dusch v. Davis, 387 U.S. 112 (1967) 18

Gaffney v. Cummings, 412 U.S. 735 (1973) 16

Latino Political Action Committee Inc. v. City of Boston, 568 F.Supp. 1012 (D.Mass. 1983) 4

Lucas v. Colorado General Assembly, 377 U.S. 713 (1963) .2,10

Mahan v. Howell, 410 U.S. 315 (1973) 8

Markoe v. Legislature of Virgin Islands, 592 F.2d 188 (3rd Cir. 1979) 4

Martin v. Venables, 401 F.Supp. 611 (D.Conn. 1975) 4

New York State Ice Co. v. Liebmann, 285 U.S. 262 (1931) 21

Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975) 4

Constitutional and Charter Provisions And Statutes

New York State Constitution Art. IX §2.....12

New York City Charter

§21.....11
§23.....13
§91.....13
§93.....13
§94.....12

N.Y. Municipal Home Rule Law §10 (13) 15

OTHER AUTHORITIES

Charo, *Designing Mathematical Models to Describe One Person, One Vote Compliance by Unigue Governmental Structures: The Case of the New York City Board of Estimate*, 53 Ford.L.Rev. 735 (1985) 18

New York Times, Dec. 21, 1984, B 5, Col. 3.....9

New York Times, Jan. 25, 1985, B 1, Col. 1 15

New York State Charter Revision Commission (1975) 21

Sayre & Kaufman, *Governing New York City* (1960) 7

Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Col.L.Rev. 21 (1965) 7

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SUMMARY OF ARGUMENT

The lower courts committed fundamental error by analyzing the degree of voter inequality present on the Board of Estimate without including the three dominant members of the Board, the three citywide officials who hold 55% of the votes of the Board. Despite the statement in the first circuit court opinion that the presence of the citywide officials presented "novel" issues which should be assessed, the district court ignored the citywide officials. For this reason, their analysis and resulting computations are meaningless.

The lower courts also erred in conducting an analysis of the Board in a vacuum—by viewing the Board as a structure standing alone, rather than as one piece of the delicate mosaic that is the New York City governmental structure. The exceptional New York City governmental structure includes a strong mayor, a comptroller and a city council president, all elected on a citywide basis; a unilateral legislature, the City Council, with districts drawn strictly on a population basis; and the Board of Estimate, purposely established to give each borough meaningful representation in City governance. This entire governmental structure deals with the immense pressures facing New York City and attempts to meet the greatly varying problems of all New Yorkers, whose ranks are much larger than merely census population. The unique City of New York, the financial and banking capital of the world, the host to the largest diplomatic population in the world, the home to hundred of thousands of illegal aliens and countless homeless people, has deliberately set in place a governmental structure to blend citywide concerns with local interests. And yet, the courts below dealt a crippling blow to this structure "by the uncritical, simplistic and heavy handed application of sixth grade arithmetic." (*Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 751 (1963), Stewart, J. *dissenting*).

Finally, the brief argues that without meaningful representation on the Board, the people of the borough of Staten Island, who live in a borough totally different from the rest of the city, will be left with no real voice in the determinations that impact so greatly upon the quality of their life. If the decision of the

lower courts is allowed to stand, an implied contractual condition of the 1898 consolidation, namely meaningful representation within city governance, will be breached. We respectfully request that this Court either allow the Board to remain in its present form or deem the contract of consolidation voidable with the option to the voters of Staten Islanders to remain a part of the City of New York or to become a separate governmental entity.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

As is detailed in the Affidavit I submitted to the District Court (Joint Appendix, hereinafter cited as "J.A.", 431-449), I represent the 24th Senatorial District in the New York State Senate, which encompasses all but a small portion of Staten Island. I was first elected to the Senate by the voters of Staten Island in 1956 and have served as a senator continuously since that time. Since my election in 1956, I have been intimately involved with legislation concerning the City of New York, having served as Chairman of the New York State Senate Committee on the Affairs of New York City from 1963 to 1973 (except in 1965, when my political party was not in the majority). From 1973 to date I have served as Chairman of the New York State Senate Finance Committee. For several years I have been the lead sponsor on many, if not most, of the bills in the New York City legislative program. My interest in and concern for the City of New York sparked two ill fated runs for New York City Mayor in 1969 and 1973.

My strong involvement in the governance of the City and State of New York prompted my intervention as an amicus curiae supporting the appellants in this litigation in 1983, after the first circuit court decision remanding the case to the district court. As I argued in the briefs submitted to both courts below, it is imperative that the structure of the Board of Estimate be retained as presently composed. I respectfully submit this brief in support of the proposition that the Board of Estimate's voting structure is constitutional.

POINT ONE

THE COURTS BELOW ERRED IN NOT CONSIDERING THE CITYWIDE OFFICIALS IN ITS ANALYSIS OF THE BOARD OF ESTIMATE.

In making their determinations concerning the degree of voter inequality present on the Board of Estimate, the courts below committed a fundamental error which rendered their computations meaningless—they determined that an analysis of the Board could be made by discounting entirely the presence of the three citywide officials.

During the first trip to the circuit court, Judge Lasker, speaking for the unanimous bench in remanding the case, stated "the district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so)" (Appendix to Jurisdictional Statement, hereinafter cited as "J.S.A.," at 201). In a footnote which modified the foregoing statement, Judge Lasker quite accurately noted "the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative" (J.S.A. 207). Honorable Justices, I am not offended by the profferment of a good question. While a dictionary definition indicates that "should" is tantamount to an order, the district court airily dismissed this directive and rejected the view that the Board posed novel questions, stating that its "essential electoral design is unexceptional and does not present first impression problems" (J.S.A. 136).

To justify the disregard of the citywide members of the Board, the district court cites five cases in which the presence of at-large members of legislative bodies were not included in calculations to determine the degree of malappointments.[1] Each

1. At J.S.A. 137-138, the following are cited: *Latino Political Action Committee Inc. v. City of Boston*, 568 F. Supp. 1012 (D. Mass. 1983), involving the City Council of Boston, Massachusetts. *Cohen v. Maloney*, 410 F.Supp. 1147 (D.Del. 1976), involving the City Council of Wilmington, Delaware; *Markoe v. Legislation of Virgin Islands*, 592 F.2d 188 (3rd Cir. 1979), involving the Senate of the Virgin Islands; *Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) involving the Board of Aldermen of Opelousas, Louisiana) and *Martin v. Venable*, 401 F.supp. 611 (D. Conn. 1975), involving the Town Council of Stratford, Connecticut.

of these cases dealt with small legislative bodies in cities which are in no way comparable to New York City, either in terms of demography and size, or governmental structure. In all of these cases, each at large and each district member had one vote, with the district members together always holding the majority of votes. In each of these cases, the at large member was elected by the voters for the specific purpose of serving on the legislative body in question and was not a member of the body by virtue of another office he held. Despite all of these differences, the district court found that these cases were "sufficient decisional precedent . . . to avert—as unwarranted—an unchartered departure" from the *Abate* formula (J.S.A. 138).

In round 2 in the circuit court, the bench, this time minus Judge Lasker, reacted with indifference to the disregard of the citywide officials, stating that if the citywide officials had more than a 6-5 majority on the Board "a different analysis might be called for" (J.S.A. 44). The court called the appellants' distinction between the at-large votes being a minority or majority of the Board a "red herring" (*id.*), finding "no evidence that . . . the distinction on which the appellants rely is a qualitative difference as opposed to a difference in degree" (*id.*). In his concurring opinion, Judge Newman (who is the only judge who was on the circuit court benches for both decisions), qualifies the court's decision on this issue, explaining "what we have not decided and need not decide, is the point at which an apportionment according substantial voting power to at-large representatives would satisfy constitutional requirements, notwithstanding otherwise unacceptable deviation among the . . . districts" (J.S.A. 53-54). Additionally, the circuit court justified disregarding the citywide officials from the analysis of the Board on the basis that "the citywide Board members and borough presidents represents different interests, and that this divergence justifies measuring deviation from voter equality by applying the *Abate* test to the borough presidents alone" (J.S.A. 30). Here the court loses me completely—isn't the fact that the citizens of the entire city vote for the citywide Board members who represent the entire city, while the citizens of each borough vote for their borough presidents who represent that borough, exactly the reason why Judge Lasker directed that there be a consideration

of the novel presence of both citywide and district members on the Board?

Any representative body is a sum of its parts—the part is not one thing and the sum another. The body that is the Board of Estimate is composed of two distinct, yet totally dependent and inseparable parts. The major component is the citywide portion with 3 citywide members elected by all the city electors, holding 55% of the Board's vote. Those citywide members can hail from anywhere in the city, could in fact reside in 3 abutting apartments in one building in any one borough. Those citywide officials have the obligation to represent the entire city, to effectuate a realistic and progressive consensus that benefits the entire city. The minor component of the Board, with 45% of the votes, is the district, or borough portion, with 5 borough presidents individually elected by the electors of their boroughs, who together comprise all city electors. By the elimination of the three citywide members, the district court was able to use the simple *Abate* test, and preclude the complications presented by the presence of the citywide officials.

Both Courts below failed to consider the Board members in terms of anything more than the number of votes cast on the Board. The mayor, for example, who has overwelming power in all aspects of city life, sits on the Board as the mayor (not as an at-large Board of Estimator), casting two out of the eleven total votes. Through his various mayoral agencies, he proposes most of the Board's agenda items—land use and zoning changes, leases, contracts, franchises, etc. The comptroller, who possesses overwhelming power in the financial affairs of this city, sits on the Board as the comptroller (not as an at-large Board of Estimator), casting two votes out of the eleven total votes. As comptroller, he audits the financial transactions and expenditures of the city. Examination of the genesis of a typical Board of Estimate agenda item illustrates the special and dominant role of these two citywide officials. The Department of Transportation (DOT), a mayoral agency, is responsible for negotiating leases for commercial space at the ferry terminals. DOT will issue a request for proposals, select the most favorable proposal and negotiate the lease with the prospective lessee. If the mayor's agency is not satisfied with the lease, the process

does not go any further. If the lease is satisfactory, its terms are then reviewed by the comptroller. If a decision is made by the mayor and comptroller to proceed with the lease, the proposed lease is signed by the lessee and DOT has it placed on the Board of Estimate calendar for approval. Both the mayor and the comptroller, who have played pivotal roles in the formation of this lease, will then vote as members of the Board on its approval. Their power and influence over this item is obviously not to be measured merely in terms of their 4 out of 11 votes.

Because of the instrumental role played by these citywide officials in the generation of most of the items on the Board's agenda and by virtue of the other substantial powers of their elective offices, the mayor and comptroller are the dominant members of the Board. The different roles played by the borough and citywide officials was recognized by Sayre & Kaufman in their seminal work on New York City government:

> "The Borough Presidents bring to the Board neither the impressive formal powers of the Mayor or of the Comptroller, nor the ambiguous potential of the President of the Council: instead, each Borough President . . . has the formal capacity to claim that he speaks, as no other member of the Board can, for the specific interests of his borough." (W. Sayre & H. Kaufman, *Governing New York City* (1960), J.A. 281).

This dominance of the citywide officials led Chief Judge Weinstein of the Eastern District of New York, who was then Professor Weinstein, to conclude that the current voting structure of the Board did not present a substantial federal issue "in view of the control exercised by the officials representing the entire city" (Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Col.L.Rev. 21, 39 (1965). Despite the importance of and the significant power exercised by these citywide officials, the courts below refused to even consider these members in their analysis of the Board.

Additionally, by refusing to delve into the citywide component the lower court missed one single, yet vital fact concerning the election of those members—the voters in the larger boroughs have a more significant opportunity to influence the

outcome of a citywide vote, and thus have more political clout with the citywide members of the Board.[2] An analysis of the effect of an individual borough president's vote is particularly significant in our case not merely because of the unusual composition of the Board, but because of the city's peculiar geography. With one borough a peninsula, two boroughs distinct islands and the fourth and fifth boroughs tips of another island, the boroughs are identifiable parts of the City, with special needs and concerns. No other borough is comparable to Manhattan (perhaps because there is no other place in the world comparable to Manhattan). There is also no other borough comparable to Staten Island, which until the building of the Verrazano Narrows Bridge in 1964 had no land connection to the other boroughs.[3] While the Staten Island voters obviously have complete control over the election of their borough member of the Board, those voters lack any opportunity to have their influence felt in the election of the citywide members. As Justice Brennan pointed out in *Mahan v. Howell,* 410 U.S. 315 at 348 (1973) "it should be obvious that as a voter's concern with regional or statewide issues increases relative to his interest in county issues, the significance of voting outside the county will correspondingly diminish." Staten Island, the only non-million population borough has very little influence in citywide races (the collective votes of all Staten Island electors have never made a difference in any citywide election since the turn of the century consolidation), while Brooklyn and Queens have significant influence. The second circuit opinion recognized the influence of the bigger boroughs: "it may be that citywide representatives will be more responsive to 'Brooklyn's interests' because of the greater number of Brooklyn votes," and that this "may mitigate somewhat the effects of the deviation in voter equality" (J.S.A. 47). However, the court rejected placing any significance on this phenomena, stating that it is at best "theoretical" and "in no way substantial enough to counteract the 132.9% deviation." (*id.*) I beg to differ, as a Board of Estimate vote of fairly recent vintage illustrates.

2. The larger boroughs also have significant representation in the other governmental structures that form New York City governance, as will be discussed at length in point two of this brief.

3. The uniqueness of Staten Island will be discussed at length in point three of this brief.

In the affidavit I submitted to the courts below, details of a 1984 Board vote on 8 resource recovery plants were related (J.A. 447-448). While the need for constructing resource recovery plants in the 5 boroughs to deal with the city's 22,000 tons a day of garbage "was universally acknowledged, the practical problem of where to locate the plants which would undoubtedly generate opposition from residents living near the proposed sites, remained." (J.A. 447) A mayoral agency, the department of sanitation, formulated a plan which specified the location of the first 5 of these resource recovery plants, 1 in each borough, and placed the plan on the Board of Estimate's agenda. The specified Brooklyn location was the Brooklyn Navy Yard, in the Williamsburg section of Brooklyn (with a population of less than 100,000) (J.A. 448). The Williamsburg residents raised vociferous objection to the proposals, and won the vital support of Brooklyn Borough President Golden, with his 1 Board vote, New York City Comptroller Goldin, with his 2 Board votes and New York City Council President Bellamy, with her 2 Board votes. Newspaper accounts document that the opposition to the resource recovery plants on the part of Messrs. Golden and Goldin was solely based on the Williamsburg issue. Borough President Golden stated that the plan "unfairly subjects the Williamsburg community to an experimental technology" (*N.Y. Times,* Dec. 21, 1984 B5 Col. 3), while Comptroller Goldin explained that "although he generally agreed with the plan, he opposed the location of the resource recovery plant . . . near the Williamsburg section of Brooklyn" (J.A. 448). The resource recovery plants did, however, pass by a 6 to 5 vote since the mayor and the 4 non-Brooklyn borough presidents voted for it. If the Board had then been apportioned under the weighted vote scheme proposed by the Appellees (J.A. 350) the resource recovery plan would have been defeated, since the 16 votes of the Brooklyn Borough President, combined with the 20 votes of Comptroller Goldin and the 20 votes of Council President Bellamy would have made up the majority, by 56 to 54. Being part of the colossus Brooklyn, which would have a borough president with 16 votes in a restructured Board and has a 2.3 million borough population of vital importance to the re-election of citywide officials, the residents of

Williamsburg (or any similar Brooklyn community) can have their voice thunderously heard. On the other hand, Staten Island's 350,000 people, with a borough president having 3 votes in a restructured Board would hardly be able to muster a wimper.

In addition to providing a meaningful analysis of the Board, both courts also failed to grasp the reality that the Board functions as but one part of the amalgam which is the New York City governmental structure. Through these errors, the courts below dealt a heavy blow to the structure of New York City "by the uncritical, simplistic and heavy handed application of sixth grade arithmetic" (*Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 750 (1963), Stewart, J. *dissenting*).

POINT TWO

THE COURTS BELOW ERRED IN VIEWING THE BOARD AS AN INSTITUTION STANDING ALONE, RATHER THAN AS PART OF THE ENTIRE STRUCTURE WHICH GOVERNS OVER ALL THE PEOPLE OF THE CITY OF NEW YORK, WHOSE RANKS ARE MUCH LARGER THAN MERELY CENSUS POPULATION.

The courts below erred in not considering the entire structure which governs New York City in determining whether the equal protection clause has been violated. The Board is an exceptional institution, one part in the nearly century old governmental structure of New York City—a structure which is a unique amalgam of a strong mayor, a comptroller, and a president of the city council; a unilateral legislature (City Council); and a Board of Estimate. The mayor, the comptroller and city council president are elected by all the voters of the City. The City council is divided into 35 districts, each drawn on population basis; the Board of Estimate is (and has been since 1901) composed of a mix of the three citywide officials (the mayor, comptroller and president of the city council, who are all elected on a citywide basis) and the five borough presidents. The Board was purposely established to deal with local matters, encompassing primarily the use of city land and the grant of city contracts, by blending citywide and borough interests. All these entities together

make up the unique structure which governs the extraordinary City of New York. It is impossible to separate one part of the delicate mosaic that is New York City government and draw any legitimate conclusions about voter inequality. It is axiomatic that computations which are supposed to characterize an entity must accurately reflect what that entity is in reality, not how it may look in an artificial vacuum. The courts below declared unconstitutional New York City government by applying a single mathematical calculation to only one part of the membership of only one piece of the amalgam. In so doing the governmental structure of New York City was grossly mischaracterized and resulted in error which must be rectified by this Court. Indeed, the structure which governs more than seven million people is "far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth grade arithmetic" (*Avery v. Midland County, et al.*, 390 U.S. 474, 510 (1967) Stewart, *dissenting*).

The Board of Estimate is not a legislature and cannot enact any laws, nor levy any taxes. All the legislative powers in New York City are vested in the New York City Council, whose members are elected from districts drawn on a strict population basis. There are currently 35 members of the City Council, with the following breakdown according to borough: Brooklyn-11½ (Brooklyn shares one district with Staten Island); Queens 9; Manhattan-6½ (Manhattan shares one district with the Bronx); Bronx-6½; Staten Island-1½. The Council members from the two most populated boroughs, Brooklyn and Queens, with 19½ votes comprise more than the majority of votes on the City Council. The City Council is the only governmental body in New York City which can enact laws, levy taxes or confirm mayoral nominees to commissions (*N.Y.C. Charter* §21). The New York State Legislature, composed of a Senate and Assembly, with districts drawn on a strict population basis, also plays an important role in enacting legislation dealing with all political subdivisions of the State, with particular emphasis on its biggest locality, New York City. Any laws dealing exclusively with New York City can only be enacted after receipt of a "home rule request" from the local legislative body, the city council (*N.Y.C. Constitution*, Article IX §2, *N.Y.C. Charter*,

§21). Only the City Council can provide the consent of New York City to the passage of these laws by the State Legislature, with the Board of Estimate playing no part in this process.[4] Since the State Legislature is apportioned on a population basis, the large New York City boroughs have far greater representation and far greater voice in determinations concerning State legislative action than the smaller boroughs. For example, the borough of Brooklyn has 19 members of the Assembly, Queens has 15, and Staten Island has only 3. The borough of Brooklyn is represented by 8 Senators, Queens by 5½, and Staten Island, 1¼. In addition, in every legislative session since 1975 the Democrats were and are in control in the Assembly, with the powerful Speaker of the Assembly hailing from the borough of Brooklyn.[5]

The mayor, the comptroller and the city council president are also integral pieces in the mosaic known as New York City government. The mayor, who is elected on a citywide basis appoints the heads of all administration departments, all commissioners and all of the non-elected city officials, with a few specific exceptions.[6] To name some of the activities for which the mayor is responsible: all seven members of the City Planning Commission, which has primary responsibility for the conduct of planning in the city, are mayoral appointees who serve at the mayor's pleasure; the Department of General Services, which is responsible for managing city-owned buildings and administering city construction programs is a mayoral agency; the Departments of Social Services, Transportation and Personnel, are all mayoral agencies; the mayor appoints all the non-ex-officio members of the New York City Health and Hospitals Corporation, which runs all city health institutions. There is no doubt that the mayor's role in city governance is awesome.

4. The local legislature can authorize a home rule request by a majority vote of its members together with the approval of the mayor or by a two thirds vote of its members alone. In all areas of the state other than New York City the necessity of receiving a home rule request from the local legislature can be waived, upon a certificate of necessity from the governor stating an emergency situation and a two thirds vote of both houses of the state legislature (*N.Y.S. Constitution* Article IX §2).

5. The Democrats controlled the Assembly in the following years 1935, 1959-1964; 1965-1968; 1975-present—in each of these years the Speaker was from Brooklyn. The years in which the Republicans controlled the Assembly, the minority leader was from Brooklyn.

6. For example, the comptroller has the authority to appoint the deputy comptrollers (*N.Y.C. Charter* §94).

The comptroller is elected on a citywide basis, at the same time and for the same term as the mayor. He has the power to investigate all matters relating to or affecting the finances of the city. The City Charter mandates the comptroller audit all financial transactions and official accounts and expenditures of the city, as well as the operations and progress of all city agencies (*N.Y.C. Charter* §93). The comptroller has the power and duty to audit all vouchers for payment before any city money is expended, has the power to settle and adjust all claims in favor of or against the city, and administers and manages the several sinking funds of the city and all other trust funds held by the City (*N.Y.C. Charter* §91).

The president of the city council is elected citywide at the same time and for the same term as the mayor. He serves as the "ombudsman," and is given the Charter responsibility for the "coordination of citywide citizen information and service complaint programs," the "review of complaints of a recurring and multi-borough or citywide nature relating to services and programs, and making "proposals to improve the city's response to and processing of such complaints" (*N.Y.C. Charter* §23).

Along with the City Council, the State Legislature, the mayor, the comptroller and the city council president, the final piece in the mosaic that is New York City government is the Board of Estimate. The Board of Estimate, with its function to negotiate and enter into contracts on behalf of the city, to determine the development of all city-owned property, to approve and modify zoning requirements, makes the determinations which have the greatest local import.

In *Avery v. Midland County*, in which this Court extended the equal protection clause's applicability to the Midland County Texas Commissioner's Court, Justice White stressed that "this Court is aware of the immense pressures facing units of local government and of the greatly varying problems with

which they must deal." (390 U.S. 474 at 484 (1968)). It is not an overstatement that no locality in our country is faced with more intense pressures than New York City. We respectfully request that this Court not lose sight of the fact that this case does not concern a City Council in Wilmington, Delaware or a Board of Aldermen in Opelousas, Louisiana. We are dealing with an integral part of the delicate structure which governs 7 million people, with diverse needs, concerns and problems.

In the affidavit submitted by David Jaffe, the district court was asked to take judicial notice of the volumes of statistical data and reports "which clearly demonstrate that New York City is different from any other governmental entity in the United States . . ." (J.A. 490-491) New York City, with its 7 million people, is larger than any other city in the United States and is larger than forty one states; the four largest New York City boroughs (all but S.I.) individually would rank higher in population than all but six United States cities. The budget of New York City $17.2 billion in 1984, is bigger than the budget of numerous countries including Argentina, Columbia, Denmark, Greece, India, Ireland, South Korea, Portugal, Switzerland, Thailand and Turkey (J.A. 491).

The unique nature of New York City's population is also an important reason why a requirement of population apportionment should not be imposed on the Board of Estimate. In the proceedings below, the "parties stipulated that the population of the city of New York is 7,071,030 and that the population of Brooklyn is 2,230,936, Queens 1,891,325, Manhattan 1,427,533, the Bronx 1,169,115 and Staten Island 352,121" (J.S.A. 9-10). However, a mere recitation of the latest census count does not even come close to depicting accurately the people who together comprise New York City. Consider, for example, the fact pointed out in the Jaffe Affidavit, that more than one out of seven persons residing in New York City are not

citizens of this country and thus are not entitled to vote.' (J.A. 492). Perhaps even more significantly, there is estimated to be as many as 500,000 unregistered, illegal aliens who have not been counted for census purposes and thus were not included in the figures which formed the basis of the calculations arrived at in the proceedings below (*id.*). These illegal aliens, as well as the thousands of homeless persons[8] who live in city shelters or on city streets are a very real part of New York City, utilizing city services, impacting upon the city fisc and creating problems which must be dealt with on a borough and citywide basis by the Board of Estimate.

There are other very significant blocks of people who make New York City what it is and who are not included in the census figures—the financial and banking community and the diplomatic community. New York City is the financial capital of the world and residence of numberless multinational entities and as such is the daily host to tens of thousands of non-resident commuters. Also, as the headquarters of the United Nations, New York City is the host to over 160 nations, and has the largest diplomatic population in the world, numbering over 35,000 persons.

There is no doubt that New York City is much more than just a municipality with a population of 7 million people. There

7. As Mr. Justice Brennan explained in *Burns v. Richardson,* 384 U.S. 73 at 92 (1966) "aliens, transients, short term or temporary residents, or persons denied the vote for conviction of crime" do not have to be included in the apportionment base. New York Law allows land legislature bodies to apportion using a population base of residents, citizens or registered voters. (*Municipal Home Rule Law* §10(13). While an apportionment based on registered voters would probably not pass constitutional must (*Burns v. Richardson, supra* at 92-93), New York City could exclude aliens from its apportionment base, which would result in a completely different borough by borough population.

8. These homeless persons are often not even from New York City. For example, the *N.Y. Times* reported that nuns who run a homeless shelter in Hoboken, New Jersey, send an average of five persons a night to New York City where facilities are set up outside the train station for feeding homeless people "while they wait for a city van to pick them up and take them to public shelters." (*N.Y. Times,* 1/25/85 at B1).

is no doubt that the people which the city serves and over which the governmental structure must govern are much more than a mere compilation of the census figures in the five boroughs. Yet, the Courts below dealt a crippling blow to New York's governmental structure by merely looking at numbers of people. As Justice White aptly pointed out in *Gaffney v. Cummings:*

> " 'An unrealistic overemphasis on raw population, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.' " 412 U.S. 735 at 749 (1973)

By basing their calculations on "raw population" figures and applying those figures to only one part of the amalgam that is New York City government, the courts below totally "submerged other considerations" and "ignored important factors in the day to day operation" of the unique City of New York.

POINT THREE

IF THE LOWER COURTS' DETERMINATIONS ARE UPHELD, STATEN ISLAND WILL BE LEFT WITHOUT MEANINGFUL REPRESENTATION IN CITY GOVERNANCE, WITH THE PERFORMANCE OF AN IMPLIED CONDITION OF CONSOLIDATION RENDERED IMPOSSIBLE.

An implied condition underlying Richmond County's entrance into Greater New York was its retention of a meaningful voice in determining its future.[9] It is significant to note that the appellees agree that Staten Island would never have chosen to consolidate unless its citizens believed they would have a meaningful representation in New York City governance—this is a position with which "of course plaintiffs do not disagree" (J.A. 544). Additionally, the district court accepted this theory of a

9. The circumstances surrounding Richmond County's entrance into Greater New York are detailed in various submissions to the courts below. *See* Aff. of John J. Marchi, at J.A. 433-435; Aff. of Loring McMillen, at J.A. 452-456, Aff. of Les Trautmann, at J.A. 479-480.

breach of an implied contractual condition, but held that "any such tacit agreement as has been nullified by post *Baker v. Carr,* 369 U.S. 186 (1962) case law" (J.S.A. 80), stating that "this latter day jurisprudence abrogated Staten Island's turn of the century implied condition." (*id.*).

Without meaningful representation on the Board of Estimate, the people of Staten Island will be left without a voice in city government. As has been detailed in Point One of this brief, Staten Island is the least populous of the 5 boroughs and has very little representation on the city council, and in the New York City delegation in the state legislature. Additionally, Staten Island "rarely enjoys any political clout" with regard to influencing the elections of citywide officials (J.A. 485, 486—this is discussed at length in Point One of this brief, *supra*). With a Board of Estimate apportioned on a population basis, Staten Island's board representative would be reduced to a mere observor. With a Board of Estimate apportioned on a population basis, Brooklyn would be able to exercise inordinate control over the determinations that greatly affect Staten Island.[10] The devastating effect of Staten Island's loss of meaningful participation on the Board becomes even clearer when one considers two facts: Staten Island, as all parties admit, is the one borough which is different from the rest of the City; Staten Island, with its vast amounts of undeveloped land, is disproportionately affected by the Board's decision.

It is beyond dispute that Staten Island is different from the other boroughs. The Staten Island of today, just as the Staten Island of the consolidation era is "an anomaly, a suburban borough in sharp contrast to the other four urbanized boroughs of New York City . . . almost everything about Staten Island is sharply different from the rest of the City" (*Aff. of Trautmann,* J.A. A478-479; *see also Aff.* of *Regan,* J.A. 473-474; *Aff. Jaffe,* J.A. A489-492). Staten Island is the only borough where

10. If the Board of Estimate were strictly apportioned on a population basis, Manhattan, whose revenues largely support the rest of the City (with modest help from Staten Island) and the piteously fiscally dependent Bronx would suffer a diminishing of voting power. This is most significant when one considers that the Manhattan and Bronx borough presidents are the only minority members of the Baord.

the majority of housing units are owner-occupied; the only borough where primary transportation reliance is on automobiles rather than mass transit; the only borough where mass transit is totally surface transportation, almost totally by bus; and the only borough where car users face a four dollar bridge toll to reach the nearest borough, Brooklyn, when other city and state motorists are able to reach other boroughs gratis. In numerous ways, the interests and concerns of Staten Island are different from those of the rest of New York City. As has been previously discussed, the Board was purposely established to insure that the needs of each borough are blended with citywide concerns. When this Court in *Dusch v. Davis* (387 U.S. 112 (1967)) spoke with approval of the borough composition of the Council of Virginia Beach, it could easily have been describing the policy reasoning behind the current composition of the Board of Estimate, saying that it refects:

> "a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia and rural countryside." (*id.* at 117).

With a Board of Estimate strictly apportioned according to population, the unique interests of the people of Staten Island could never be adequately voiced within the governmental structures in New York City. The devastating impact of this lack of representation is magnified when one considers the fact that most of the city's undeveloped land is on Staten Island (J.A. 515).

The one governmental agency that has the most influence over how this land is used and developed is the Board of Estimate. "The Board's land use and planning authority makes it the pre-eminent body directing real estate development in a city marked by extraordinary land values [and] acute housing shortages." (Charo, *Designing Mathematical Models To Describe One Person One Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 Ford. L. Rev. 735 at 737 (1985)).

How the Board of Estimate exercises its enormous land use power in the next decade will irrevocably determine the future

character of Staten Island, since planners now assert that Staten Island will be "built out" within ten years (J.A. 486). In his submission to the Court below, the current Staten Island Borough President, Ralph Lamberti, summarized the overwhelming significance of the Board's land use decisions:

> "Staten Island's undeveloped land and its remoteness from the rest of the City has for decades provided an irresistible temptation to dump every imaginable undesirable project on our shores. Study after study has demonstrated that Staten Islanders have an excessive incidence of lung cancer. There can be little doubt that a major contributing factor is the high toxic pollution of our air. Yet, within the past few years alone, not only were we confronted with plans to site a major coal and garbage burning power plant here, but also to construct a coal-slurry terminal and pipeline which would have destroyed waterfront and neighborhood properties on two Island shores. With the . . . closing of all other City landfills, there are now plans to continue to pile garbage at Fresh Kills until it reaches a height of 500 feet, higher than the highest natural surface on the Island. Even with an equal vote on the Board, our success in fending off these life-threatening intrusions has been marginal. These are not matters merely of personal annoyances or evidence of a 'not in my backyard' mentality. They are clear and present dangers to the well being of my constituents." (J.A. 515, 516).

The Appellees discount Lamberti's concerns by arguing that Staten Island is "first and foremost a borough of New York City. As such, its land-use planning is to be exercised for the benefit, not only of Staten Islanders, but also for citizens of the entire City" (J.A. 540-541). This statement precisely sums up the reason why Staten Island's concerns are realistic—with no voice in the Board's determinations, if a conflict arises among borough interests, Staten Island's interests will necessarily fall. This statement also precisely sums up the reasoning why the Board's current composition was established, namely the blending of borough and city concerns: "the Board of Estimate is well structured to make important political decisions and to resolve conflicts between city-wide and local in-

terests . . ." (*New York State Charter Revision Commission* at 1 (1975)).

It is clear that Staten Island would never have agreed to be consolidated into New York City unless it had a meaningful voice in New York City Government. It is beyond question that if the decision below is allowed to stand Staten Island will not have any true voice in that government. This implied condition of the contract of consolidation is being breached by the lower courts' decision.

This Court should not allow the decision below which eradicates such an essential element of the consolidation that enticed Staten Island to give up its independence to be permitted to stand. It should allow the Board of Estimate to remain in its present form or in the alternative the original contract of consolidation should be deemed voidable with the option to the voters of Staten Island to remain a part of New York City or to become a separate governmental entity.

CONCLUSION

This Court's acceptance to hear and review this litigation elevated over expectations that the crippling blow dealt to New York City government by the Courts below would be healed and justice for all New Yorkers would finally prevail.

The honorable members of this Court, constituting as it does the ultimate bower of our freedoms will cast a long shadow of decisive importance as our population marches into the next millennium. If the lower courts' decision is left intact, the obvious solution to politically vexing or difficult decisions made by a largely indifferent, heavily urbanized New York City would be to develop an unacceptable resolution on Staten Island. The lower courts' scenario would condemn the people of Staten Island to the role of a thoroughly and permanently defeated minority without the benefit of even the flimsiest defense against dissimilar multitudes residing miles away, across a choppy bay.

The Board's current composition and voting structure assures that each resident in all parts of the diverse city is adequately represented. The Board assures the result, epitomized by the medieval cry which hastened the decline of feudalism,

that "city air makes free." As cities grow larger and relationships more complex, it is necessary for jurists to apply his or her jeweler's eye more carefully to assure that city air can insure meaningful participation of all city residents.

The Board of Estimate has been

> "shaped by the special needs which have arisen during particular times in the City's history. Specifically, it has been a magnet for issues that require deliberate judgments in the best interests of the City as a whole . . . The Board is not a body devised by esoteric social scientists, but rather an institution forged from the singular historical developments and attributes of New York City and its district geographic parts." *New York State Charter Revision Commission* at 1-2 (1975).

For nearly a century the Board has been an integral part of the delicate mosaic that governs over a city now 7 million people strong. The Board, a unique institution in an exceptional city is the grand experiment that works, keeping an incredibly diverse city operating as a single unit.

In reviewing this case, we respectfully remind the Court of the words of Justice Brandeis in his dissent in *New York State Ice Co. v. Liebmann:*

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation . . . This Court has the power to prevent an experiment . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." (285 U.S. 262 at 311 (1931)).

We respectfully request that reason and justice prevail and this Court reverse the lower courts' determination.

Respectfully submitted,

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